Brf. of Stocking for Respondent.

IN THE

United States Supreme Court.

No. 113.

Filed Nov. 10, 1899.

SAMUEL CASTNER, Jr., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

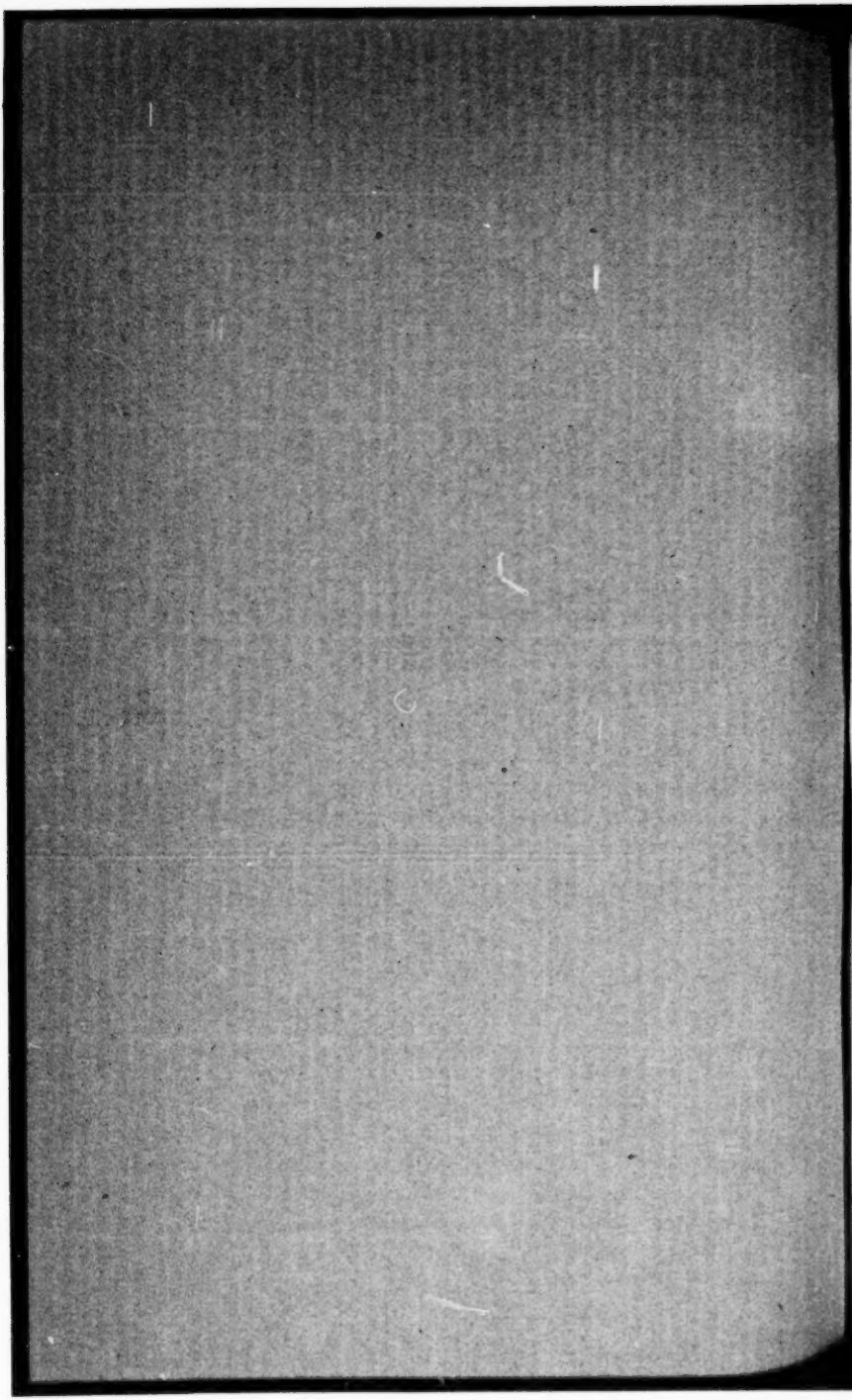
vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for Coffman, Appellee.

E. B. STOCKING,
Counsel for Coffman.



BLEED. THROUGH POOR COPY

IN THE

United States Supreme Court.

SAMUEL CASTNER, Jr., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee*.

No. 113.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR COFFMAN, APPELLEE.

MAY IT PLEASE THE COURT:

This cause involves the right to the exclusive use of the word "Pocahontas" as a trade-mark.

The Circuit Court of Appeals of the Fourth Circuit in Castner & Curran *vs.* Coffman (87 F., 457), Record, page 147, held that "Pocahontas" is a word of well-known geographical signification and that complainants (appellants) are not entitled to the exclusive use of the word "Pocahontas" as descriptive of either the locality or character of the coal

mined in the Pocahontas coal field, but all producers of that product in that section have the right to use it in common with complainants. That the word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same.

The Circuit Court of Appeals, First Circuit, in Atwater *et al. vs.* Castner *et al.* (88 F., 642), held that "This (trade-mark or trade-name "Pocahontas") has been used for fully twenty years by the complainants below and their predecessors in title, in a very extensive trade with unbroken public acquiescence. * * * It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their implied representation of uniform quality and excellence. In addition to the public acquiescence, of which we have spoken, there had been, prior to the injunction appealed from, an adjudication in the Circuit Court in the Fourth Circuit sustaining the claimed trade-mark or trade-name, and enjoining its infringement." And (p. 644) held that "The order was clearly proper when made, and if the circumstances remained unchanged we could not reverse it."

The Honorable Court suggests that the rule laid down in Canal Co. *vs.* Clark (13 Wall, 311) and Mill Co. *vs.* Alcorn (150 U. S., 460) was compellably qualified in Singer Mfg. Co. *vs.* June Mfg. Co. (163 U. S., 169) "as applied to trade-marks and trade-names which have been long and extensively used and have become widely recognized by the public at large, even when they might not have originated in accordance with the ordinary rules of law." * * * "Some of the reasons which render it necessary under some circumstances to protect, at least to a qualified extent, a

BLEED THROUGH POOR COPY

trade-mark of a geographical origin, were given by us in Levy *vs.* Waitt" (61 F., 1008–1012).

"Note by the Court. Mills Co. *vs.* Eagle Co. (86 F., 608), which came to hand since our opinion was passed down, fully sustains our suggestions about trade-names of geographical origin."

The established rule is that a geographical name or the name of a locality cannot be monopolized as a trade-mark or trade-name.

"Lackawanna" Coal case:
Canal Co. *vs.* Clark, 13 Wall, 311 (20–581).

"Columbia" Flour case:
Mill Co. *vs.* Alcorn, 150 U. S., 460 (37–1144).

"Moline" Plow case:
Candee *vs.* Deere, 54 Ills., 439.

"Durham" Tobacco case:
Blackwell *vs.* Wright, 73 N. C., 310.

"Columbia" Paper case:
Morgan Env. Co. *vs.* Walton, 86 F., 605, C. C. A.

"Elgin" Watch cases:
Illinois Watch-case Co. *et al. vs.* Elgin Nat. Watch Co., 94 F., 667, C. C. A.

And many others.

Canal Co. *vs.* Clark has been followed in

Smith *vs.* Reynolds, 10 Blatchf., 105;
McLean *vs.* Fleming, 96 U. S., 254 (24–832);
Amoskeag Mfg. Co. *vs.* Trainer, 101 U. S., 54–60 (60–994–96);
Filkins *vs.* Blackman, 13 Blatchf., 444;
Pepper *vs.* Labrot, 8 F., 40;
Humphreys Specific Homeopathic Medicine Co. *vs.* Wenz, 14 F., 253;
Gray *vs.* Pulley Works, 16 F, 440–441;
Satchelberg *vs.* Ponce, 23 F., 431;
Kinney *vs.* Allen, 1 Hughes, 112;

Burton *vs.* Stratton, 12 F., 700;
Wilcox & G. S. M. Co. *vs.* The Gibbens Frame, 17 F., 625;
A. B. Brewing Assn. *vs.* Piza, 23 Blatchf., 246, and 24 F., 150;
Pratt Mfg. Co. *vs.* Astral Refining Co., 27 F., 494;
And many others.

There are several cases in which protection of a geographical trade-name has been granted as against non-residents, mainly on the ground of deception and unfair competition, but not on the ground that either residents or non-residents have any right to an exclusive use of such a trade-name.

Akron Cement case—Newman *vs.* Alvord, 51 N. Y., 189.
St. Louis Lager Beer case—Anheuser-Busch Bg. Co. *vs.* Piza, 24 F., 149, C. C.
Gage-Downs Co. *vs.* Featherbone Corset Co., 83 F., 213.
Mills Co. *vs.* Eagle, 86 F., 608, C. C. A.
Collinsplatt *et al. vs.* Finlayson *et al.*, 88 F., 693.

The only cases where the name of a locality has been to any material extent affirmed as a trade-name, are those involving a natural product and then only when the producer was the owner of all of the mines, springs or other source of the product.

Genesee Salt Co. *vs.* Burnap, 67 F., 534.
Clinton Metallic Paint Co. *vs.* N. Y. M. P. Co., 50 N. Y., 437.
La Republique Francaise *vs.* Schultz, 57 F., 37, and same parties in 94 F., 500.

That extended use, before or after adoption of the word as the name of a locality, will not confer an exclusive right to the name as a trade-name.

See Canal Co. *vs.* Clark, 13 Wall., 311 (20–581), and Glendon Iron Co. *vs.* Uhler, 75 Pa., 467.

In the former case, a use of "Lackawanna" had existed for forty-two years, and in the latter case "Glendon" had been adopted and used for sometime *before* its adoption as the name of the town. It is not seen how the alleged use of the word "Pocahontas" for 18 or 20 years can confer an exclusive right to its use upon appellants.

Prior and Primary Use of "Pocahontas."

Appellants allege adoption July 1, 1882 (Rec., Exh. B, p. 10), and a first shipment of coal July 30, 1883 (Rec., p 59, Exh. "Collins Receipt"), but on August 25, 1885, Castner and Company, Limited, predecessors of appellants, applied for and secured registration of the word "Pocahontas" as a trade-mark, and in the sworn statement then and for that purpose made, set up that "This trade-mark has been used continuously by said corporation since about January 1, 1885." The post-office of Pocahontas was officially established June 30, 1882 (Rec., pp. 54 and 154). Coal was discovered in Pocahontas in 1873, and development work done in 1881 (Rec., pp. 125 and 135). Further, it is shown (Rec., pp. 100–104) that appellants' predecessors did not use the word "Pocahontas" as a trade-name in 1882 to distinguish their product but used words to distinguish their mines, to wit: "No. 1", "No. 2" and "Baby", so that it is reasonably established that at first, at least prior to January 1, 1885, "Pocahontas" was used by appellants and their predecessors primarily to indicate location and character of coal there mined and not origin or ownership, and therefore no right to that name or word as a trade-name exclusive of the other thirty or more producers of coal from the same locality had been acquired by appellants or their predecessors prior to January 1, 1885, the date set up in their application for registration.

To acquire exclusive use of a trade-name it must be adopted for the *primary* purpose to indicate the *producer* of the commodity. (See Mill Co. *vs.* Alcorn, *supra.*)

Complainants' Right Limited and Used Deceptively.

Even if "Pocahontas" is a legal trade-mark, appellants cannot employ it in connection with another coal than that mined and produced by the Southwest Virginia Improvement Company. Appellants claim the common-law right under an assignment from the originators of the trade-mark (Exh. B., p. 10). This assignment sets up that as the appellants have been appointed the general (not exclusive) factor or agent of, and acquired the entire control and output of, coal mined by said company, which coal has become known as "Pocahontas," and as appellants are desirous of securing also the exclusive right, title and interest in and to said trade name or mark "Pocahontas" for all coal to be hereafter sold by Castner & Curran, therefore, in consideration of five dollars, the company assigns to Castner & Curran "all and whatsoever right, title, interest, and good-will the said corporation, the Southwest Virginia Improvement Company has, or ever had, in and to, by adoption and use, of the word symbol 'Pocahontas' as a trade name or mark for coal; the same to be held and enjoyed absolutely by the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid, as Castner & Curran, forever, for their own use or advantage and behoof, and for the use or advantage and behoof of their successors, legal representatives or assigns, as fully and entirely to all intents and purposes at common law or otherwise, as the said corporation, the Southwest Virginia Improvement Company could or might, or would have held the good-will, right, title and interest in the said trade name or mark 'Pocahontas,' hereby conveyed absolutely

unto the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid as Castner & Curran, had this assignment and sale of the said good-will and entire right, title and interest in and to the said trade name or mark 'Pocahontas' for coal, not been made."

Even if the company had a lawful right to the trade-mark "Pocahontas," it applied solely to coal mined by the company, and therefore,

1st. Appellants alleged exclusive right applies only to coal mined by the Southwest Virginia Improvement Company.

2nd. The charter of the Southwest Virginia Improvement Company did not authorize them to deal in trade-marks, except possibly as an accompaniment to their mines, plant and good will. Kidd *vs.* Johnson, 101 U. S., 617–620 (25–769). The Fair & Jose Morales & Co., 82 Ms Apa, 499 (Oct. 99).

3rd. The company could not transfer any exclusive right to the trade-mark to be applied to "all coal to be hereinafter sold by Castner & Curran."

4th. Being an assignee, appellants have failed to announce that fact to the public, in connection with their use of the mark, and could not therefore obtain protection from any court, because they are practicing a deception upon the public in that they (as set up in their bill, Rec., p. 4, Par. X) sell other coals as Pocahontas than that produced by the Southwest Virginia Improvement Company.

Manhattan Medicine Co. *vs.* Wood, 108 U S., 218.
Satchelberg *vs.* Ponce, 23 F., 430, and 128 U. S., 686–691.

Words Indicating Quality.

Primarily "Pocahontas" indicates only two things. First, a locality where certain mines exist; and, second, the quality, class or grade of coal mined at that locality.

Neither of these functions of the word can be lawfully monopolized in this country as a trade-mark or trade-name, because a trade-mark or trade-name must indicate either directly or by association, origin (personal) or ownership, that is, *who* is the producer of the commodity and distinguish that producer from other producers of the same commodity in the same locality. (Canal Co. *vs.* Clark, *ubi supra*, and Amoskeag Mfg. Co. *vs.* Trainer, 101 U. S., 51 (25–993).)

In France it has been held that a trade-mark "ought to consist essentially in a term which is other than the general, common, usual or scientific (*vulgaire, commune, usuelle ou scientifique*) designation of the product." (Versailles, January 6, 1897, cited in Annuaire Farjas, 1899, page 403. Foreign Patent and Trade-mark Laws, page 136—Greeley.)

In England the same rule seems to hold. In Reddaway *vs.* Banham, 1 Q. B., 286, it was held that one manufacturer can call his goods by the name which said goods of another manufacturer has acquired in the market if the name consists only of words of description which are a correct description of the goods. The mark in this case was "Camels Hair Belting." This decision was rendered in 1896, Eng. Appl. Cases, 199, thus giving protection to words indicating quality. But see the more recent case of The Cellular Clothing Co. *vs.* Maxton & Murray, decided April, 1899, in the House of Lords and reported in full in The Trade Mark Record (N. Y.), August and September, 1899, pages 192 and 211, respectively. In this case a trader in 1886 made a new weave of a fabric generically known as "gauze" and selected for this weave the name "cellular," and it seems clear from the comments on the "Camels Hair Belting" case that it turned on the question of intentional fraudulent deception. In the "Cellular" case protection was denied.

BLEED THROUGH POOR COPY

English precedents should be carefully considered as the "Three Mark Rule" permits different persons in the same trade up to the number of three, but not more, to register identical marks. (Greeley, *supra*, p. 133.)

Secondary Meaning.

Can extended use of any geographical name give it a secondary meaning, so that it will point to the producer of the commodity? The answer to this question must, it is thought, depend largely upon the nature of the commodity to which the trade-name is applied. If the commodity be the product of the hand of man, *perhaps*, yes; but if the commodity be the product of nature, no. Coal is a natural product; nature gives it its distinguishing characteristics, and these differ principally in relation to each other as the localities of the mines differ, mines in one locality producing coal of similar character, grade and quality. In the case at bar, Pocahontas coal possesses such chemical and structural features as to have caused it to be the best steam-making coal produced in this country, so much so that it has supplanted the prior use of Swedish coal in sea-going vessels both public and private. These characteristics of Pocahontas coal are not the product, nor the result, of the work of the hand of man in mining, cleaning, grading or sizing the same. Even if appellants have acquired a higher reputation than any one else could possibly attain in the performance of this manual work upon the raw product, they must employ a trade-name which points to themselves as the producers, so as to distinguish themselves from other producers in the same locality of the same natural product.

Singer Mfg. Co. *vs.* June Mfg. Co. is referred to by the honorable Court in the first circuit as an instance where the rule that a word indicating quality cannot be protected as

a trade-mark was necessarily qualified, and stating that there is ground for maintaining that the same necessity exists in trade-marks which represent well-known localities, and citing Levy *vs.* Waitt, 61 F., 1008–1012, as giving some of the reasons rendering necessary, under some circumstances, to a qualified extent, the protection of a trade-mark of geographical origin. The Court also notes Mills Co. *vs.* Eagle, 86 F., 608.

In these cases the commodities were a sewing machine, cigars and flour, respectively, none of them being natural products. In the Singer case it was found that the name "Singer" had acquired a descriptive function indicating a particular make of sewing machine, but that this function reverted to the public at the expiration of the patents under which it had been manufactured. This case certainly does not show any necessity for protecting one party in the use of a name of locality as a trade-name for a natural product of that locality, which all other parties have a right to produce there and sell.

In Levy *vs.* Waitt the court found that "Blackstone" was the name of a street, a river, a canal and a town in Massachusetts, but found it not necessary to decide whether the use of the word "Blackstone" as a trade-mark for cigars rendered the mark illegal.

In Mills Co. *vs.* Eagle, 86 F., 608, the geographical name was protected for resident manufacturers as against a non-resident vendor of inferior flour on the ground that the question was simply one of unfair competition in which exclusive right to any mark was not essential.

As there are exceptions to the rule prohibiting the protection of trade-marks consisting of geographical names, as in cases where unfair competition or fraud upon the public results, so also there *may be* exceptions to the rule against the use of words expressive of quality.

FILED THROUGH POOR COPY

In one case the trade-mark or name was not geographical but purely fanciful and did not of itself indicate quality and had a primary object to indicate skill. La Favorita Flour, Mendenez *vs.* Holt, 128 U. S., 514–520 (32–526). See Lawrence Mfg. Co. *vs.* Tenn. Mfg. Co., 138 U. S., 537–552 (34–1004).

All of these conditions are reversed in the trade-name "Pocahontas." The primary object of its adoption by appellants' predecessors was not to show any skillful selection but merely locality and the character of a local product, their coal being originally known as from "Mine No. 1," "Mine No. 2," or "The Baby" mine at Pocahontas, this word being well known in the Virginias from its historical significance and therefore not fanciful, and finally clearly indicating a certain quality of coal.

If it be possible for a trade-mark lawfully to acquire a secondary meaning, it must be because of a meritorious quality of the article which has become known by extended sales to the public, but such quality must not and can not lawfully be indicated by a trade-mark.

Take the Singer case; the public were indifferent as to *who* made that machine; what they wanted was the Singer machine by whomsoever made. It was the fact that, at that time, it was a better machine than most any other. Note this in proof; just as soon as the patent expired, Singer machines made by several other manufacturers had large sales. The people were anxious to reap the fruits of the reversion to them of the right to manufacture that machine and cared not one whit who made them.

Take Waltham watches, Am. W. W. Co. *vs.* Sandman, 96 F., 330. It is too late in the day of American Mechanical Achievements to say that any firm cannot make as good watches as another. So that if Waltham watches have merit, it results from the skill acquired by long experience

and possessed by mechanics centered in Waltham, and open to the services of any manufacturer located there. Can one firm monopolize this reputation? The people care not whether their Waltham watches are manufactured by Smith or by Jones so long as they are made in Waltham. When we give to an unlawful trade-mark a secondary meaning, it does not make it lawful, especially when that meaning is one prohibited as a function of a trade-mark. But this case also turned on the point of unfair competition and fraud. This idea of secondary meaning is one to be applied only in cases where in its essential features a trade-mark is lawful. Extent of use does not excuse a mistake in selecting a descriptive word or a geographical name as a trade-mark, and where these defects exist, it would seem that the rights of the public at large are better protected by refraining from imparting to a trade-name of doubtful validity any secondary meaning which would put upon a majority of producers the onus of distinguishing their products from those of a single producer in the same market.

Certainly there is yet to be found a case where the name of a locality has been sustained as a trade-mark for a natural product of that locality unless and only where the producer owned all the mines, springs or other source of that product in that locality or where used by a non-resident, causing unfair competition. The latter instance was fully illustrated in Mills Co. *vs.* Eagle, 86 F., 608, noted by the court in the First Circuit.

To hold that an extended use of a geographical trade-name may give it a function of indicating a producer of an article or product free to be produced by any one, is subject to grave objection as it encourages mischievous monopoly. It is only necessary for a manufacturer or producer to begin now to use such a trade-name, and to refrain from contesting an exclusive right thereto for a series of years and then submit the case.

As to Unfair Competition.

There is positively no evidence of record showing any fraud on the part of defendant, as even the witnesses in behalf of the complainants, who, it will be noted, are not prominent dealers, but evidently small consumers in obscure portions of Virginia and West Virginia, do not swear that the defendant ever sold ~~their~~ his coal as the product of the plaintiff. Of course the coal was sold, as claimed by several witnesses, as Pocahontas coal and as equal in quality to the coal of complainants, which defendant has a perfect right to do in fair business competition, in view of the established fact that the coal sold by defendant is from the *same vein*, and in several cases from mines the entire product of which *was previously sold by the complainants.* (See affidavit of W. Kilpatrick, page 129, wherein complainants have attempted to re-secure the product of the Indian Ridge Mine from which defendant is selling coal.) The affidavit of E. H. Matson, page 34, claims that the coal was sold upon the assumption that it was Pocahontas coal. Defendant's coal was undoubtedly Pocahontas coal and from the evidence of this witness must have been of sufficiently good quality to have materially decreased the sale of complainants' coal. There is no fraud established by these witnesses but instead an honest statement of the origin and character of the coal. Likewise the affidavit of complainants' shipping agent positively fails to establish any fraud and only claims the sale of inferior coal under the name of Pocahontas. This affiant says there is a certain inspection of the coal by which complainants' product is alleged to be in a superior condition, so that the alleged trade-mark Pocahontas must clearly indicate coal from which the impurities have been removed by the usual method. Defendant however shows by the affidavits (pages 124, 125 and 127) that there is a thorough

inspection of his coal. The affidavit of A. S. Hurst (p. 37) seems purely to relate to the inspection or assorting of the coal and he is also an employee of the complainants, who simply refers to one mine with which he has not been connected since November 1, 1896. The affidavit of Thomas Q. Wilcox (p. 38), who is also an employee of complainants, merely relates to their inspection and may be set aside in view of the careful consideration given the subject of fraud and inspection by Judge Goff (record, pages 156 and 157) in his exhaustive decision.

The complainants have attempted to show fraud and deception by the affidavit of L. D. Calfee (p. 40) who purchased coal from defendant believing it to be complainants' coal, but he actually purchased Pocahontas coal. So there was no fraud or deception. The unsatisfactory quality of the coal may have been largely dependent upon the uses to which affiant put it, as he is apparently a small consumer or retail dealer and not a general user of steam coal nor competent to point out any difference in quality between complainants' and defendant's coals. (See Comparative Analysis Table (pp. 118-121) showing defendant's coal as good as and in some cases better than complainants'.) The most that can be said of the affidavit of N. A. Sayers (p. 41) is that he believed the coal to be similar to that sold by complainants. It was undoubtedly from the same vein and must have been similar, but as an intelligent man he certainly knew that he was not purchasing the coal from complainants. Again this affiant does not point out why the coal was inferior in quality to the product of complainants. Attention is also directed to the affidavit of John M. Stockman (p. 42), who merely states that the coal was represented to be of the same character and quality as that of complainants. Defendant's record establishes this to be true, but this affiant is not willing

BLEED. THROUGH POOR COPY

to swear that the coal was not equal in quality to that of complainants. He states that he purchased the coal, "fully believing the same was equal in quality" to complainants', and he does not and probably would not state that it was not equal. The affidavit of Charles E. Wales (p. 43) shows no fraud or deception, as the coal dealt in was similar in character and quality to complainants' coal, and produced from the same vein and actually from the same mines from which some of complainants' coal has been shipped. Fred W. Barney (p. 45) is complainants' agent, and his affidavit largely deals with the question of business competition, and he as an interested party undoubtedly believed the word "Pocahontas" to indicate the coal shipped by complainants, but his knowledge did not seem to comprehend that while complainants dealt in Pocahontas coal, there were other parties who dealt in the same coal and had an equal right to designate it as Pocahontas coal.

Horace M. Claxton, who is also an agent for complainants, submits an affidavit (p. 46) in which he attempts to establish complainants' exclusive right to the word "Pocahontas," and such testimony is not surprising in view of his interest in the case, but he does not set forth any deception or fraud. Complainants also place of record the affidavits of George D. Atkins (p. 48) and Henry R. Mather, both agents, interested in the sale of their coal, who make affidavits attempting to establish their principals' right, but they do not cite a single instance of unfair competition or misrepresentation. The parties were employed for the specific purpose of making the affidavits presented by them, and it is but reasonable to presume that they complied with the request of their principals. The affidavits have no material effect upon the case, as they simply make assertions without any specific instances of misrepresentation on the part of the defendant.

If the several affidavits before mentioned are considered in connection with the fact that Pocahontas could not be appropriated as an exclusive trade-name, there are no allegations against defendant, particularly in view of the fact that on pages 121 to 124 of the record defendant presents recommendations from purely disinterested parties as to the character of his coal, which surely should set aside the opinions of complainants' agents that the coal was not of the same quality as that shipped by their principals. In view of the recommendation of Taylor Bros. (p. 122), defendant's coal is deemed preferable to that of complainants. In connection with complainants' affidavits, attention is also called to that of Frederick J. Kimball, who substantiates defendant's claim that the settlement and post-office were known as Pocahontas as early as the middle of 1882, before a railroad was completed or any coal shipped. It is probable that his statement is true, that the town of Pocahontas was created by the efforts to mine the coal there, and that the Southwest Virginia Improvement Company called the town and post-office Pocahontas, but his affidavit does not establish any claim to the exclusive use of this word, and under the decision in the Glendon Iron Works before cited, they gave to all parties doing business in this locality an equal right with themselves to the use of the name by which the natural products have become identified. It also seems from complainants' sworn statement in connection with their trade-mark that they did not use the term as a trade-mark until January 1, 1885. It would therefore seem that prior to this time they did not assert nor claim any exclusive right to the use of this term, and it is difficult to see how at a later date they could adopt a geographical name as their trade-mark. In doing so they have assumed a weighty burden of proof to establish, not only priority of the adoption of the word "Pocahontas," but that by their exclusive

use of the word it has acquired a secondary meaning, to-wit: "Castner & Curran" of Philadelphia, Pa., and furthermore, that the word "Pocahontas" has not acquired with the public the generally-accepted meaning of locality.

In law a trade-mark is a means of indicating producership. As an actual fact, a trade-mark is a substitute for the name and address of a producer, a sort of a commercial shorthand character. Does "Pocahontas" mean a certain locality or does it mean Castner & Curran?

Nor is this all. Complainants charge fraud and hence is added to their burden the presentation of satisfactory evidence of fraud and of unfair competition. As stated by the Chief Justice in the LL Cotton Sheeting case, "the deceitful representation or perfidious dealing must be made out or clearly inferred from the circumstances." (Lawrence Mfg. Co. *vs.* Tenn. Mfg. Co., *ubi supra.*) The *onus probandi* is upon the complainants to distinctly prove the fraud they allege; if not, relief cannot be had even if the party charged has not been *perfectly* clear in his dealings.

It will be found however that the defendant below has in no case represented his coal as that of complainants. Appellants rely upon two circular postal cards issued by Coffman (pp. 30–31). The statements in these cards are absolutely truthful and proper. In one he says, "for steam purposes it has no equal. All mines now producing in the Pocahontas Flat Top District are working the same vein of coal." There is not one word of reference to coal inspected by Castner & Curran. Coffman denies the fraud alleged in the bill, and also that he has in any manner simulated the trade of Castner & Curran. The record establishes the fact that he sells the very same coal that Castner & Curran sell; he sells the Browning mine's coal, a near neighbor to the Southwest Improvement Company's mines and located

in the town of Pocahontas. He also sells coal from the Indian Ridge Mines, the product of which was sold by appellants as Pocahontas coal prior to November 1, 1896 (p. 128).

Inspection.

Appellants would lead the Court to believe that they changed the character and quality of the coal by screening and inspection. The affidavit of C. Botsford (p. 126) states that he is and has been general manager of the Indian Ridge Coal and Coke Company ever since their mines were opened and that their coal is thoroughly inspected since they have been shipping through the defendant. Further than this, the engineer at the Flat Top Coal Land Association has given his complete approval as to the manner in which this property has been operated, and this fact is an additional safeguard of inspection.

Mr. Kilpatrick, the president of the Indian Ridge Coal and Coke Company, swears (p. 128) that the mines of his company are within the Pocahontas Coal Field and that the coal is of a superior quality and used for the best purposes. He also states that the inspection is as thoroughly rigid as when sold to Castner & Curran, and particular attention is called to the important fact that "Castner & Curran" have made an effort to get the Indian Ridge Coal and Coke Company's coal to sell since W. H. Coffman has been selling said company's coal, and even at that late date they made no mention of said company's coal being of an *inferior quality*. The affidavit of Justus Collins (p. 124) sets forth that he is a part owner in mines located in the Pocahontas Coal Region of West Virginia, known as the Louisville Coal and Coke Company and the Greenbrier Coal and Coke Company. His affidavit establishes that *before complainants entered the field*, there was a thorough inspection of the coal and that no change

BLEED. THROUGH POOR COPY

has been made in the grading or verification of the product by their inspection. From the following quotation it will be seen that affiant contradicts the complainants concerning the men who performed the work of inspection:

"That the operators in the field furnished the men, who performed the work of inspection; that these men are common laborers, as well as the sub-inspector who acts as foreman at each tipple in the Pocahontas District, and are carried on the pay-rolls of the several companies themselves, with the exception of the foreman and chief inspector. In addition to that, a charge is made on all coal operated by Castner & Curran of about one cent per ton to cover the cost of inspection."

The importance of this statement will be appreciated.

The only witness who attempts to allege that he was deceived in purchasing coal from Coffman is M. A. Sayers (Rec., p. 41), and his statement is very doubtful, as he says, "that in subsequent correspondence with W. H. Coffman, of said Pocahontas Coal and Coke Company, the said Coffman represented the coal of said company to be the same as that being placed upon the market or offered by said Castner & Curran, upon which representation this deponent purchased from said Pocahontas Coal and Coke Company about 80 or 100 tons of such coal, fully believing the same was the Pocahontas coal of Castner & Curran." Sayers had been handling complainants' coal, probably as agent, and he bases his belief in an argumentative manner, from the fact that defendant was selling Pocahontas coal from the same field and vein as that of complainants. He does not swear that Coffman represented that the coal sold by him had been selected, screened, cleaned, graded or inspected by Castner & Curran, and having purchased from those parties before, certainly knew he was not dealing with them.

Resume.

The law and authorities urged and the facts developed in the record seem to warrant an unquestionable acceptance of the following propositions:

1st. A geographical name cannot be appropriated as a trade-name, nor can protection in such use thereof be granted except (*a*) as against a non-resident practicing unfair competition, or (*b*) where the entire source of a natural product is the property of the user of such ~~monopoly~~ *trade-name*.

2nd. Use *per se* however extended cannot confer an exclusive right to such a trade-name and this whether prior or subsequent to its adoption as the name of a locality.

3rd. If such a name can acquire a secondary meaning indicating quality, it can only include natural qualities of a natural product of the locality so named, and *contra*, any quality possibly indicated by a geographical trade-name applied to a natural product cannot be such as to point out an individual producer from a number of producers in the same general field.

4th. If a trade-mark or trade-name be assignable in gross (*i. e.*, separate from the good will and the manufacture or production of the article to which it is applied), its application in the hands of the assignee is restricted to the article and manufacture of the assignor, and such restriction must be indicated in connection with its use by the assignee. Any other use would be deceptive.

5th. Pocahontas acquired in 1882 a geographical meaning, to wit, a locality in Virginia.

6th. "Pocahontas" in connection with the word "Coal" has acquired a well-defined meaning in the public mind, to wit:—coal mined in Pocahontas Coal Field at and about Pocahontas, Virginia.

7th. "Pocahontas" Coal has also acquired the well known meaning of a smokeless, semibituminous steam-making coal

BLEED. THROUGH POOR COPY

produced in the Pocahontas Coal Field of Virginia, regardless of the individuality of its producer or seller.

8th. The use of Pocahontas in connection with coal produced in the Pocahontas Coal Field is open to each and all producers of such coal.

9th. The essential test of fraud and of unfair competition is representing one's product as the product of another.

10th. Fraud and unfair competition must be clearly established. They cannot be assumed.

11th. Appellee, defendant below, has not been guilty of selling his coal as coal inspected by Castner & Curran, or of fraud, or of unfair competition.

12th. Appellants have no exclusive right to the word "Pocahontas" as a trade-name, either alone, or in connection with the word "Coal."

13th. Appellants have no title to the trade-name "Pocahontas" either alone or in connection with the word "Coal."

15th. Pocahontas was primarily used by the predecessors of appellant to indicate the locality of their "No. 1," "No. 2," and "Baby" mines.

16th. If the coal produced at the Indian Ridge Co.'s mine was, when sold by appellants, Pocahontas Coal, the same coal sold by appellee is "Pocahontas Coal."

In conclusion, it is urgently submitted that appellants, ten years after the establishment of the rule relating to geographical names in Canal Co. *vs.* Clark, having adopted, as they alleged, "Pocahontas" as a trade-name, have not shown any peculiar, pressing or satisfactory grounds for an exception to that rule. On the contrary, it is fair to presume that "No. 1," "No. 2," and "Baby" were the actual trade-names adopted by appellants' predecessors, and that the primary purpose of "Pocahontas" was to indicate local-

ity and quality, both of which functions of the word were and certainly now, by long use, are free to all producers of coal in the Pocahontas Coal Field.

It is also urgently submitted that as appellants have utterly failed to show that appellee, defendant, has, in a single instance, represented his coal as coal cleaned, screened, graded or inspected by appellants, actual fraud is not established.

Finally, unfair competition has not been shown in any of defendants dealings with the public. He has truthfully described his coal as Pocahontas coal, and as having all the good qualities of that coal, and no circumstances simulative, deceptive or otherwise exist in the record which can possibly give ground for *presuming* unfair competition.

Respectfully submitted,

E. B. STOCKING,
Counsel for Coffman.

WASHINGTON, D. C.

BLEED THROUGH POOR COPY